



DEPARTMENT OF ENVIRONMENTAL QUALITY  
POLICY AND PROCEDURES

SUBJECT: Parallel Proceedings  
Date: February 23, 2004

Number: 04-004  
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**ISSUE:**

This policy permits the Michigan Department of Environmental Quality (MDEQ) to pursue simultaneous or successive civil, administrative, and criminal actions against the same violator for the same violation. Its purpose is to allow the MDEQ to achieve complete relief for substantial environmental violations, and not have to choose between civil and criminal actions.

**DEFINITIONS:**

None.

**POLICY:**

Parallel proceedings represent the simultaneous or successive pursuit of civil, administrative, and criminal enforcement actions against the same violator for the same or related conduct. The majority of environmental statutes administered by the MDEQ authorize both civil and criminal enforcement. Double jeopardy principles do not prohibit civil and criminal actions against the same violator for the same violation.<sup>1</sup> Complete and appropriate relief for substantial violations of the law will, in some circumstances, require the MDEQ to pursue both civil and criminal enforcement actions. Therefore, it is the policy of the MDEQ that parallel proceedings are permissible and necessary when the circumstances warrant.

This statement is an internal MDEQ policy only, and does not create rights in parties outside state government, nor does it limit the department's discretion to adapt the policy to fit to unusual situations when circumstances warrant.

- 1 **Deciding to Pursue Parallel Proceedings:** It is not possible to catalogue all the circumstances where MDEQ staff should consider the pursuit of parallel proceedings. In general, where a violator has engaged in willful, egregious, or repeated conduct that has caused substantial damage to the environment or to human health, parallel proceedings should be considered. One example of egregious conduct is a defendant who violates an administrative order like a cease-and-desist order, or who continues to violate the law after receiving written notice of a violation. If the fines and other relief available in the criminal action are inadequate to compensate for or remediate the violation, a civil action for damages should also be considered.<sup>2</sup> Or, if there is ongoing environmental damage that the violator

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<sup>1</sup> It is also permissible to file a civil action against a company for damages and injunctive relief, and a separate criminal charge against company officials who are responsible for the same violation.

<sup>2</sup> A "civil action" as used in this policy includes an administrative action.

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will not stop voluntarily, a civil action for injunctive relief should be considered, along with a criminal prosecution. These are meant as examples only, and are not exhaustive.

On the other hand, the MDEQ's overall goal is to carry out a predictable, reliable, and effective enforcement program. The MDEQ and the Michigan Department of Attorney General (DAG) have limited resources with which to accomplish that goal. Spending multiple resources on a single violation may leave fewer resources available for other violations. Since parallel proceedings will usually require both MDEQ and DAG resources, the decision to pursue parallel proceedings should be made jointly between the DAG staff and the MDEQ. The decision to pursue parallel proceedings will usually be made after the fact-finding process has concluded and until then, each investigation should proceed normally.

2. **Information Sharing in Joint Investigations:** When it is determined that parallel proceedings are appropriate, MDEQ civil and criminal enforcement personnel should exchange information and evidence as early as possible, conduct joint investigations where appropriate, and consult with each other on a regular basis, subject to the limitations in this policy. Civil and criminal investigators may undertake joint fact-finding, such as interviewing witnesses and gathering documents together. MDEQ staff assigned to the civil investigative action should know what the criminal investigators are doing, and vice versa, in order to avoid surprises and avoid inadvertently hurting each other's investigation. In general, any information obtained as the result of legitimate civil and administrative investigations may be freely shared with criminal investigators, including the Office of Criminal Investigations (OCI) and federal investigative authorities such as the United States Environmental Protection Agency (U.S. EPA). Likewise, criminal investigators should freely share information with civil enforcement personnel unless it would compromise an ongoing criminal investigation.

There will be occasions when discretion needs to be exercised regarding the disclosure of certain information, for example, the identity or existence of a confidential informant. In consultation with the Freedom of Information Act (FOIA) coordinator or the DAG, the MDEQ should also consider FOIA implications. There is an exemption under the FOIA for "investigating records compiled for law enforcement purposes." Sec. 13(1) (b). As a practical matter, the more people who possess confidential or exempt information, the greater the opportunity for unnecessary disclosure, and the greater the effort required to redact exempt information in the event the department receives a FOIA request.

3. **Limitations and Cautions in Joint Investigations:** There are three general limitations or cautions when conducting parallel or joint civil and criminal investigations.
  - A. **Independent, good faith purposes.** Civil and criminal enforcement personnel should not use their investigative authority to help one another. For example, a civil investigator should not conduct an administrative search of a suspected violator's premises merely for

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the purpose of assisting the criminal investigator to gather evidence. A civil investigator should have an independent, good faith, civil case purpose for each step in his/her investigation; likewise, a criminal investigator should have an independent, good faith, criminal case purpose for each step in his/her investigation.

- B. **Federal grand jury investigations.** Cases in which the MDEQ is pursuing a civil enforcement action while federal authorities are conducting a grand jury criminal investigation against the same party for the same violation are rare, but if MDEQ staff are aware of such a case, special cautions apply.<sup>3</sup> As a rule, grand jury proceedings are secret. Rule 6(e) of the Federal Rules of Criminal Procedure restricts what information gained under the grand jury's authority (such as testimony before the grand jury) can be shared with those who are not part of the criminal investigative team. Without a court order, grand jury information cannot be shared with those who are not members of the criminal investigative team, and those team members will be identified in writing on a Rule 6(e) list. There are criminal penalties for violating the grand jury secrecy rule.

If MDEQ staff is involved in a case that may also involve a grand jury investigation, the best practice is to document when each piece of information was obtained and to identify the source, so that no one can claim that MDEQ staff improperly disclosed grand jury information. MDEQ staff field notes should establish that the acquired information was obtained from sources independent from the grand jury, e.g., before the grand jury opened its investigation or during MDEQ staff interviews with witnesses. When in doubt about whether to disclose information in an MDEQ file that might also be the subject of a grand jury investigation, MDEQ personnel should consult the Assistant U.S. Attorney in charge of the federal investigation.

- C. **Disclosure of the criminal investigation.** MDEQ employees involved in joint investigations or civil litigation should not disclose to the public or to the party under investigation the existence of a criminal investigation. If someone asks, a suggested response is, "we are sorry, but as a matter of policy, we do not comment on whether a criminal investigation is pending."
4. **Separate Negotiations:** Parallel civil and criminal cases should stay on separate negotiating tracks. The threat of criminal prosecution must not be used as leverage to obtain a favorable civil settlement. Likewise, civil enforcement must not be used as a threat to resolve a criminal matter. MDEQ will not consent to a violator trading civil relief (e.g., offering more money) in exchange for reducing the criminal penalty. With input from the MDEQ, prosecutors and their supervisors will make the ultimate decisions about filing criminal charges and negotiating plea agreements. Separate civil attorneys and their supervisors in the DAG, with input from MDEQ, should negotiate civil settlements.

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<sup>3</sup> Ordinarily, because a grand jury investigation is secret, MDEQ staff will not know about it, and they have no duty to inquire.

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MDEQ staff and the DAG or county prosecutor will negotiate a joint civil and criminal resolution (sometimes called a global settlement) with defense counsel *only* if defense counsel initiates the discussion. If defense counsel does ask MDEQ staff about a global settlement or “resolving everything,” staff should promptly notify the DAG, even if the DAG has not been involved to that point. It is not necessary to notify MDEQ Executive Division that a global settlement is being negotiated, unless Executive Division has already indicated an interest in the case. Civil negotiators should be aware that they lack authority to resolve criminal investigations; only prosecutors can negotiate away criminal liability. Our civil and administrative settlement documents should reflect that fact.

5. **Communication and Timing of Enforcement Actions:** It is important that the civil and criminal investigators continue to talk with one another as they proceed toward the filing of charges. If both cases are ready to be filed at about the same time, there are several reasons why it may be advantageous to delay the filing of civil charges and let the criminal case go forward.

First, if both cases are pending in court at the same time, the individual defendant may use the existence of the criminal case to avoid answering discovery requests in the civil case. For example, the defendant can legitimately plead the Fifth Amendment in response to interrogatories or at a deposition. Second, if the defendant knows about the criminal case or the investigation, he may use the civil discovery process (e.g., interrogatories and depositions) to elicit information about the criminal case that he would ordinarily not be entitled to. For example, a defendant in a civil case could subpoena or demand the production of documents from MDEQ through the civil litigation discovery process that would normally be exempt from a FOIA request. Third, administrative or civil fines preceding the criminal case can adversely affect the defendant’s ability to pay, or the perception of his ability to pay criminal fines. Fourth, obtaining a criminal conviction first may make the civil case easier, since the criminal conviction can be used under the legal principle of collateral estoppel to establish responsibility or liability in the civil case. Collateral estoppel means that a party cannot re-litigate an issue determined against him in an earlier action, even if the second action differs significantly from the first.

On the other hand, if there is an imminent and substantial endangerment to public safety, health, welfare, or the environment, the need to immediately obtain an injunction may be paramount. Deciding which enforcement action to file first or whether to file them simultaneously will be done on a case-by-case basis. Ordinarily, DAG’s Assistant Attorney General assigned to the civil matter and the county prosecutor, DAG, or Assistant U.S. Attorney assigned to the criminal case should coordinate that decision, with input from MDEQ.

6. **Communication Roles and Responsibilities:** As parallel proceedings move forward, the MDEQ staff assigned to the enforcement case and the OCI investigator assigned to the case

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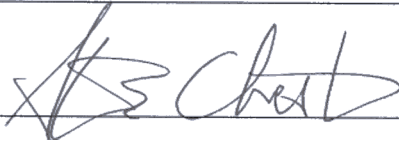
are the key players in keeping both civil and criminal sides informed about what the other is doing. There are four possible scenarios for parallel proceedings. One is a civil action filed by the DAG and a criminal action filed by the county prosecutor. A second is a civil action filed by the DAG and a criminal charge also filed through the DAG. A third possibility is a civil action filed by the DAG and a federal criminal charge filed by the U.S. Attorney. A fourth possibility is an administrative consent order negotiated directly with the violator, but with no DAG involvement, combined with a criminal investigation or charge.

In each of these scenarios, the MDEQ staff assigned to the enforcement case will be involved as will the OCI investigator. Therefore, it is critical that the MDEQ enforcement staff and the OCI investigator continue to inform each other about the status of each other's case and not let one case take precedence over the other without communication. Depending on who else is involved in the parallel proceedings, other key players (e.g., U.S. EPA, U.S. Attorney, DAG, or county prosecutor) may need to be included in the information loop. The MDEQ enforcement staff and OCI investigator combination is the minimum required.

There is no one prescribed method (i.e., e-mail, telephone, or face-to-face conversation) for keeping one another informed. That is best left to the individuals involved.

This communication protocol does not suggest that MDEQ enforcement staff and OCI should make strategic decisions by themselves in parallel proceedings. Those decisions should be made in consultation with the DAG, county prosecutor, or Assistant U.S. Attorney.

Approved: \_\_\_\_\_



Date: \_\_\_\_\_

2-23-04